Supreme Court, U.S.
FILED
DEC 30 1998
OFFICE OF THE CLERK

(2)

No. 98-831

In The

Supreme Court of the United States

October Term, 1998

THE ALBUQUERQUE JOURNAL,

Petitioner,

v.

CESAR GONZALES, A/K/A COUGAR, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPPS PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
505-765-5900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

DISCUSSION 1

I. The Tenth Circuit's Opinion Conflicts with Decisions of the Second, Ninth, and Eleventh Circuits 2

II. The Core Controversies Posed by This Case Are Not "Fact Specific" 5

III. Congress Has Neither Addressed the Questions Presented by This Case nor Indicated Any Willingness to Do So in the Future 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Seattle Times Co. v. Seattle Mailer's Union No. 32, 664 F.2d 1366 (9th Cir. 1982) 5

Seattle Times Co. v. United States District Court, 845 F.2d 1513 (9th Cir. 1988) 4, 5

United States v. Ellis, 90 F.3d 447 (11th Cir. 1996) 4

United States v. Suarez, 880 F.2d 626 (2d Cir. 1989) ... 2, 3

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

U.S. Const. amend. I ..... *passim*

VII Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures* ch. III, pt. A, § 3.03 2

OTHER AUTHORITIES

143 Cong. Rec. S8069-70 (daily ed. July 24, 1997) (statement of Sen. Domenici) 7

Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, 64 Geo. Wash. L. Rev. 189 (1996) 7

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Albuquerque Journal ("Journal") respectfully submits this reply brief in support of its Petition for a Writ of Certiorari [hereinafter Petition], and in response to Respondents' Brief in Opposition [hereinafter Respondents' Br.].

DISCUSSION

Defendants (Respondents in the present proceeding) accurately describe the essence of the decision that the Journal asks this Court to review – namely, that aside from the generic payment vouchers that may be disclosed after the conclusion of trial-court proceedings against each of twenty-two Defendants, "all" of the remaining materials filed with the district court under the Criminal Justice Act ("CJA") "are privileged information that, if released to the public, would put at risk the very principles upon which are [sic] criminal justice system is based." Respondents' Br. at 3. The Tenth Circuit has ruled that every jot and tittle of an entire statutory class of documents filed with the district courts – including, in addition to defense attorneys' itemized time records, the motions seeking the appointment and compensation of attorneys and investigators and experts at taxpayers' expense, the orders of article III judges disbursing public funds and otherwise passing upon these motions, and the transcripts of hearings concerning the motions – is off-limits to the public. And the materials must be kept secret not only during the pendency of the prosecution – when

the object of ex parte proceedings under the statute is to "prevent[ ] the possibility that an open hearing may cause a defendant to reveal his or her defense," VII Admin. Office of U.S. Courts, *Guide to Judiciary Policies and Procedures* ch. III, pt. A, § 3.03, *reprinted in* Petition App. 99 – but indeed until the end of time.

That result cannot be right. Certainly it cannot be reconciled with the relevant rulings of other federal courts of appeals. The questions presented are important and recurring, as Defendants implicitly concede in arguing that any other holding by the Tenth Circuit would have imperiled "[our] criminal justice system." Respondents' Br. at 3. The issues are in no sense fact-bound, and Congress has conspicuously refrained from addressing them. Only this Court can resolve the split of authority and declare the controlling law.

I. The Tenth Circuit's Opinion Conflicts with Decisions of the Second, Ninth, and Eleventh Circuits.

Defendants assert that the Tenth Circuit "agree[d] with every other court that has considered this issue [when it held] that the district court did abuse its discretion" in ordering disclosure of CJA materials at the end of the case. Respondents' Br. at 2. They then fail to cite any such case. Similarly, Defendants proclaim that "[t]he Journal's argument . . . that it should have access to more than . . . the vouchers have [sic] never been accepted by any court." *Id.* at 12. That contention is belied by the precedents on which the Journal has elaborated.

As the Journal has acknowledged, the specific items at issue in *United States v. Suarez*, 880 F.2d 626 (2d Cir.

1989), were CJA vouchers "without the detailed back-up material attached thereto," *id.* at 630; *see* Petition at 14-15. But the Second Circuit's reasons for recognizing a First Amendment right of access to the vouchers cannot logically be confined to those items. At a minimum, the *Suarez* court's willingness to apply a constitutional "presumption of openness" to CJA vouchers conflicts with the Tenth Circuit's decision in principle. *See, e.g.*, Petition App. 52 n.1 (Briscoe, J., concurring and dissenting). And in at least two respects, the conflict is quite concrete. First, the Second Circuit's attention to the teachings of the First Amendment led the court to affirm immediate release of the vouchers, *see* 880 F.2d at 627-31 – whereas, in the present case, the court of appeals left the vouchers under seal until the conclusion of trial-level proceedings against all twenty-two Defendants.[1] Second, the Second Circuit found a "right of access to *orders of a judicial officer*, in connection with a criminal proceeding, that approve payments of public funds to private attorneys or firms." 880 F.2d at 632 (emphasis added). That holding, far from merely "mirror[ing]" the Tenth Circuit's decision, *see* Respondents' Br. at 8, directly clashes with it. *See*

---

[1] To the extent that the First Amendment would compel a different result, the Journal is by no means "satisfied with the . . . decision[ ] . . . that the vouchers . . . will be released after the last defendant is sentenced." Respondents' Br. at 2-3. But the Journal did not emphasize this ruling in its petition, because it agrees with the Tenth Circuit that the ruling is "of limited import" in view of recent amendments to the CJA that require district courts to permit prompt public access to interim vouchers under conditions indistinguishable from those that would obtain under the First Amendment. *See* Petition App. 34 n.20.

Petition App. 8-9, 33, 41-45 (refusing access to "orders . . . regarding the . . . compensation of attorneys").

Defendants' efforts to downplay the conflict between the present case and *United States v. Ellis*, 90 F.3d 447 (11th Cir. 1996), are equally flawed. The information at issue in *Ellis* went well beyond "the assets of the defendant and the fee paid to his trial lawyer." Respondents' Br. at 9. Rather, the disclosures extended to "how time was spent" by the lawyer, 90 F.3d at 450 – information that the defendant, like Defendants in this case, contended was "confidential," *id.*, but that the Eleventh Circuit, like every other federal appellate court that had considered the question, found to be ordinarily unprivileged, *id.* at 450-51; *see* Petition at 28 n.9 (citing cases). Indeed, in response to the argument that a local rule was "ambiguous" regarding the necessity of such disclosures, the *Ellis* court spoke of a "First Amendment right of access to information about the fees and costs paid to and costs incurred and services rendered by [defense] counsel." 90 F.3d at 450. And the court affirmed the posttrial release of the transcript of a hearing concerning the appointment of counsel – not only because the aim of in camera procedures under the CJA is primarily limited to "protect[ing] the defendant's right to a fair trial," but also because perpetual secrecy is hard to justify under the First Amendment. *See id.* at 450-51. The Tenth Circuit, by contrast, held that transcripts of hearings on the appointment of counsel should remain sealed completely and forever. *See* Petition App. 9, 33, 41-45.

As for *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988), it is true that the Ninth

Circuit was content to "assume" that First Amendment access rights apply to financial affidavits filed in support of an application for court-appointed counsel. *Id.* at 1516 n.1; *see* Respondents' Br. at 10-11. But because the court was overturning a decision to keep the affidavits under seal – and because the court should have affirmed that decision "if the result [was] correct, even if the trial court relied on a wrong ground or gave a wrong reason," *Seattle Times Co. v. Seattle Mailer's Union No. 32*, 664 F.2d 1366, 1369 n.2 (9th Cir. 1982) – the court could not have accepted the proposition entirely uncritically. *See also Seattle Times*, 845 F.2d at 1518 ("The district court's order sealing the [affidavits] . . . fails the [constitutional] tests. . . . Accordingly, Nickell's sixth amendment right to a fair trial does not outweigh the public's and press' first amendment right of access."). In any event, the question in *Seattle Times* was whether the affidavits would be unsealed "two months before the jury [was] scheduled to be impaneled," *id.* at 1518; "presumably," both the district court and the court of appeals were careful to note, the documents would otherwise be disclosed "at the close of the criminal trial," *id.* at 1514. The Tenth Circuit conceded nothing of the sort, and instead required impoundment without end.

II. The Core Controversies Posed by This Case Are Not "Fact Specific."

The district court was understandably reluctant to allow "unfettered access to . . . privileged information," Petition App. 88, *quoted in* Respondents' Br. at 13, but "unfettered access" was never the issue. Throughout

these proceedings, the Journal has consistently acknowledged that despite the presumption of openness that attaches to CJA filings, certain countervailing interests may "continue past the completion of the case." Respondents' Br. at 12. Thus, the Journal has advocated selective sealing and redaction to preserve those interests. The district court – which, as Defendants admit, combed through their CJA submissions "line by line," *id.* – determined that redaction was eminently workable. *See* Petition App. 90 n.2. The Tenth Circuit apparently disagreed, but it failed to consider the issue in the context of disclosure at the end of the prosecution. *See* Petition at 29.

The difference between the results reached by the district court and the court of appeals is strictly doctrinal. Obviously, the question whether a particular CJA filing should be released, either in whole or in part, is "fact specific," Respondents' Br. at 12; but the question whether CJA materials in general can safely be disclosed (subject to redaction) at the close of the case, or whether they must remain sealed entirely and eternally, is animated by important principles. Does the First Amendment require the court and counsel to endure some inconvenience in the name of openness, or is judicial "efficiency" the only pertinent consideration? Does the CJA's statutory and regulatory scheme favor eventual disclosure or continued confidentiality? Is there any substance to the notion that CJA documents are filled with pervasively and everlastingly privileged and private information? Should a whole statutory class of dealings between the court and defense counsel stay secret forever?

III. Congress Has Neither Addressed the Questions Presented by This Case nor Indicated Any Willingness to Do So in the Future.

Defendants contend that because Congress recently amended the CJA to provide for disclosures of vouchers and payment totals, "there is no need for intervention from this Court." Respondents' Br. at 16.[2] But the amendments – which are inapplicable to this case, and which, in any event, are largely scheduled to sunset two years after their effective date – do not address the issues decided by the Tenth Circuit, much less "come to the same conclusion" about them, *id.*; *see* Petition at 5 n.1. To the extent that the remarks of the amendments' sponsor are relevant at all, they confirm that Congress's latest legislation "continues to leave it to the Judge to determine if and when [CJA materials other than vouchers] should be released." 143 Cong. Rec. S8069-70 (daily ed. July 24, 1997) (statement of Sen. Domenici), *quoted in* Respondents' Br. at 16. The ball is squarely in this Court.

---

[2] Defendants also maintain that disclosure of CJA vouchers adequately informs the public about the matters in which it has a legitimate interest. *See* Respondents' Br. at 15. Plainly, however, the vouchers tell the public nothing about whether the court and counsel have conducted themselves appropriately in ex parte proceedings, *see* Petition at 22-23; and even on the subject of the expenditure of public funds, the boilerplate vouchers are in many respects unilluminating. *Cf., e.g., Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 Geo. Wash. L. Rev. 189, 249 (1996) (noting that study of racial and ethnic bias in awards of CJA fees had been hampered by bare-bones nature of vouchers, because "[m]uch cannot be known from a simple listing of amounts claimed and paid").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPPS PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900

December 1998

Counsel for Petitioner